Ketua Pengarah Pertubuhan Keselamatan Sosial v Rahim bin Darus

HIGH COURT (PULAU PINANG) — CIVIL APPEAL NO 16 –1 OF 1998
MOHD NOOR ABDULLAH J
4 APRIL 2001

Labour Law *— Employment — Social security — Invalidity pension — Whether respondent suffering from invalidity to be entitled to invalidity pension*

Labour Law *— Employment — Social security — Invalidity pension — Whether the social security appellate board was competent to decide on issue*

Labour Law *— Employment — Social security — Whether decision of appellate medical board was appealable to the social security appellate board — Employees' Social Security Act 1969 ss 33(2), 84(3) & 91(1)*

The respondent was a plant operator until he was medically boarded on the recommendation of a specialist. He filed an application for invalidity pension citing the specialist report in support of his application. The Director General of the Social Security Organization ('SOCSO') referred the respondent to the medical board for an invalidity certificate. The medical board did not certify that he was suffering from invalidity. The respondent appealed to the appellate medical board who confirmed that the respondent was not suffering from invalidity. The respondent then appealed to the Social Security Appellate Board ('the Board') who decided that the respondent was suffering from invalidity and was therefore entitled to the benefit of invalidity pension under the Employees' Social Security Act 1969 ('the Act'). Hence, this appeal was brought by SOCSO under s 91(2) of the Act on issues which involved a substantial question of law. The issues for determination were: (i) whether the Board erred on point of law in deciding that the respondent suffered from invalidity under s 16(1) of the Act, contrary to the findings of the medical board and the appellate medical board; and (ii) whether the respondent was suffering from invalidity or not was a question to be decided by the medical board and the appellate medical board and not the Board.

Held, allowing the appeal and setting aside the decision of the Board:

(1) SOCSO is not estopped from raising the issue of jurisdiction even if SOCSO had submitted to jurisdiction generally numerous times before. An invalidity or disablement question was exclusively for the medical board and the appellate medical board to decide. The Board has no such jurisdiction (see p 694D–E).

(2) The medical board comprised a chairman and one member and the appellate medical board comprised a chairman and two

assessors, involving six medical specialists to decide on the medical condition of the respondent. These constitute sufficient safeguard. The invalidity question was a medical question, better if not best answered by the medical profession and jurisprudence. The Board, comprising a legally qualified chairman and two assessors, as representative of the employers and employees was not competent to decide on such medical question (see p 696A–B).

(3) Pursuant to s 33(2) of the Act, an aggrieved party — the insured person or SOCSO — has a right to appeal against the decision of the medical board to the appellate medical board. The Act does not provide further appeal to the Board relating to invalidity pension or permanent disablement benefit pursuant to s 91(1) of the Act. Nor is the Board empowered to decide on an invalidity or disablement question. If such questions arise in any proceeding before the Board, the Board shall direct SOCSO to have the questions decided by the medical board or appellate medical board pursuant to s 84(3) of the Act. The board shall not decide on such questions (see p 696C, E).

(4) The Act empowers both the medical board and the appellate medical board to review its own decision. The legislature by conferring on the medical board and the appellate medical board the self serving power to review its own decision intends that the decision of both boards are final, conclusive and not appealable, certainly not to the Board and with exception to the High Court (see p 697C–D).

(5) The present position in our country relating to this substantial question of law is that there is no appeal from the decision of the appellate medical board to the Board. No amendments have been made to the relevant sections or s 84(3) of the Act, unlike ss 54A and 75(2A) of the Indian Employee's State Insurance Act 1948 (see p 697H).

[Bahasa Malaysia summary

Responden merupakan pengendali kilang sehingga beliau diwajibkan menjalani rawatan perubatan atas pengesyoran pakar perubatan. Beliau memfailkan satu permohonan untuk mendapatkan pencen keilatan dan merujuk kepada laporan pakar tersebut untuk menyokong permohonannya. Ketua Pengarah Pertubuhan Keselamatan Sosial ('Perkeso') merujuk responden kepada lembaga perubatan untuk sijil hilang upaya. Lembaga perubatan tidak mengesahkan bahawa beliau mengalami hilang upaya. Responden kemudian telah merayu kepada Lembaga Rayuan Keselamatan Sosial ('Lembaga tersebut') yang memutuskan bahawa responden mengalami kehilangan upaya dan oleh itu berhak untuk mendapat

faedah pencen untuk orang yang hilang upaya di bawah Akta Keselamatan Sosial Pekerja 1969 ('Akta tersebut'). Justeru itu, rayuan ini telah dimulakan oleh Perkeso di bawah s 91(2) Akta tersebut tentang isu-isu yang melibatkan satu persoalan undang-undang yang penting. Isu-isu untuk ditentukan adalah: (i) sama ada Lembaga tersebut telah khilaf tentang perkara undang-undang dalam memutuskan bahawa responden mengalami kehilangan upaya di bawah s 16(1) Akta tersbeut, bertentangan dengan penemuan-penemuan lembaga perubatan dan lembaga rayuan perubatan; dan (ii) sama ada responden mengalami kehilangan upaya atau tidak adalah satu persoalan yang perlu diputuskan oleh lembaga perubatan dan lembaga rayuan perubatan dan bukan Lembaga tersebut.

Diputuskan, membenarkan rayuan tersebut dan mengenepikan keputusan Lembaga tersebut:

(1) Perkeso tidak diestopkan daripada menimbulkan isu bidang kuasa walaupun Perkeso telah menyerah kepada bidang kuasa secara amnya beberapa kali sebelum ini. Persoalah mengenai kehilangan upaya adalah eksklutif untuk lembaga perubatan dan lembaga rayuan perubatan putuskan. Lembaga tersebut tidak mempunyai apa-apa bidang kuasa (lihat ms 694D–E).

(2) Lembaga perubatan terdiri daripada seorang pengerusi dan seorang ahli dan lembaga rayuan perubatan terdiri daripada dua orang penilai, melibatkan enam orang pakar perubatan untuk membuat keputusan tentang keadaan perubatan responden. Ini membentuk langkah-langkah berjaga-jaga yang mencukupi. Persoalan kehilangan upaya adalah satu persoalan perubatan, yang lebih baik tidak dijawab selain daripada yang berprofesyen perubatan dan jurisprudens. Lembaga tersebut, yang terdiri daripada seorang pengerusi yang mempunyai kelayakan undang-undang dan dua orang penilai, sebagai wakil majikan-majikan dan pekerja-pekerja adalah tidak kompeten untuk membuat keputusn tentang persoalan perubatan sebegini (lihat ms 696A–B).

(3) Menurut s 33(2) Akta tersebut, satu pihak yang terkilan — orang yang diinsurankan atau Perkeso — mempunyai hak untuk membuat rayuan terhadap keputusan lembaga perubatan kepada lembaga rayuan perubatan. Akta tersebut tidak memperuntukkan rayuan selanjutnya kepada Lambaga tersebut berhubung pencen kehilangan upaya atau faedah kehilangan upaya seumur hidup menurut s 91(1) Akta tersebut. Maupun Lembaga tersebut diberi kuasa untuk memutuskan persoalan kehilangan upaya. Sekiranya persoalan sedemikian timbul di dalam mana-mana prosiding yang dihadapkan ke Lembaga tersebut, Lembaga tersebut hendaklah mengarahkan Perkeso agar persoalan-persoalan tersebut diputuskan oleh lembaga perubatan atau lembaga rayuan perubatan menurut s 84(3) Akta tersebut. Lembaga tersebut

tidak sepatutnya memutuskan persoalan-persolan demikian (lihat ms 696C, E).

(4) Akta tersebut memberikan kuasa kepada kedua-dua lembaga perubatan dan lembaga rayuan perubatan untuk mengkaji semula keputusannya. Perundangan dengan memberikan lembaga perubatan dan lembaga rayuan perubatan kuasa sendiri untuk mengkaji semula keputusannya bertujuan agar keputusan-keputusan kedua-dua lembaga tersebut adalah muktamad, konklusif dan tidak boleh dirayu lagi, sememangnya bukan kepada Lembaga tersebut dan dengan pengecualian kepada Mahkamah Tinggi (lihat ms 697C–D).

(5) Kedudukan sekarang ini dalam negara kita berhubung dengan persoalan undang-undang penting ini adalah tiadanya rayuan daripada keputusan lembaga rayuan perubatan kepada Lembaga tersebut. Tiada pindaan telah dibuat berhubung seksyen-seksyen yang relevan atau s 84(3) Akta tersebut, tidak seperti ss 54A dan 75(2A) Akta Insuran Negeri Pekerja 1948 India (lihat ms 697H).]

Notes

For cases on social security, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 867–870.

Legislation referred to

Employee's State Insurance Act 1948 [India] ss 54A, 75(2A)
Employees' Social Security Act 1969 ss 15, 33(2), 34, 84(3), 91(2)

Appeal from: Application No SS(PP)7 of 1995 (Social Security Appellate Board, Pulau Pinang)

K Maniam (*Skrine & Co*) for the appellant.
Rahim bin Darus representing himself as the respondent.

Mohd Noor Abdullah J. : This is an appeal arising from the decision of the chairman of the social security appellate board ('the Board') who decided that the respondent, En Rahim bin Darus was suffering from an invalidity and was therefore entitled to the benefit of invalidity pension under the Employees' Social Security Act 1969 ('the Act'). This appeal is brought by the Director General of the Social Security Organization ('SOCSO') under s 91(2) of the Act on an issue which involves a substantial question of law.

In his memorandum of appeal, the appellant raised the following grounds:

(1) Whether the Social Security Appellate Board erred on point of law in deciding that the respondent suffered from invalidity under s 16(1) of the

Act, contrary to the findings of the Medical Board and the Appellate Medical Board;

(2) Whether the respondent is suffering from invalidity or not is a question to be decided by the Medical Board and the Appellate Medical Board and not the Social Security Appellate Board.

Facts of the case

The applicant/respondent was employed by Acidchem (M) Sdn Bhd in Seberang Perai, Pulau Pinang as a plant operator earning a salary of RM704.40 per month. He was born in 1944 and was 50 years old at the material date. His job endured the carrying of heavy loads. He had to carry chemical bags weighing about 20kg per bag and chemical containers weighing about 60kg per container through a spiral staircase to the third floor of his factory about 60ft high and discharged them into a tank. He had been in the employment of the said company for 14 years until he was medically boarded on the recommendation of Dr Tan Chong Siang, the Medical Superintendent, Bagan Specialist Centre, Seberang Perai. He filed an application for invalidity pension citing the specialist report in support of his application. The specialist report states:

> This is to confirm that the above has a case of Thyrotoxicosis with heart failure. He is unable to continue his employment as a machine operator.

SOCSO then referred the respondent to the medical board for an invalidity certificate. The board confirmed that the respondent was a 'patient of CCF and thyrotoxicosis controlled by medication'. However, the board did not certify that he was suffering from invalidity.

The respondent then appealed to the appellate medical board, which sat and confirmed the diagnosis of thyrotoxicosis but indicated that this was controlled with medication. The appellate board found further that there was no evident heart failure presently and confirmed that the respondent was not suffering from invalidity.

Based on these findings, SOCSO rejected the respondent's claim for invalidity pension. The respondent was dissatisfied with the decision and he appealed further to the Board which subsequently made a finding that the respondent was entitled to invalidity pension, contrary to the medical finding of fact by the medical board and the appellate medical board.

The chairman of the Board elucidated further facts that the respondent was without a job for one year during which period he did odd jobs as a gardener in his neighborhood for a meagre income of about RM200 per month. The respondent explained that he still felt weak and was unable to perform any work expected of a person of his age. He was still on medication for his ailing heart. Under the circumstances, he maintained that he was an invalid and persisted in his claim for invalidity pension.

It was submitted by learned counsel for SOCSO that the issue before the Board was whether the respondent was suffering from invalidity or not, and that this issue had been decided by the medical board and the appellate

medical board and that the Board had no jurisdiction. The respondent appeared before the Board. He looked frail and weak. The Board summoned a member of the board to appear and furnish additional information and to explain the diagnosis. Dr Jamaluddin Mohamad, an orthopaedic surgeon and a member of the board testified that thyrotoxicosis is a disease of the thyroid gland which could be controlled by medication. He explained that there was no evident heart failure present at that time due to the medication prescribed to him during the six months preceding his appearance before the board. He confirmed that 'a weak heart cannot take the strain of heavy duty particularly to carry 20kg of chemical bags everyday'. The Board then ruled that the finding of heart failure by the board was a qualified one and allowed the appeal. The chairman in his written decision on the issue of jurisdiction stated:

> With due respect, we are unable to agree with the submission of Mr VK Vellu. If we indeed have no jurisdiction to hear the case, the Act should set it out in clear terms that the decision of the appellate medical board is final and cannot be called in before this Board. It is indeed strange that SOCSO had not questioned the jurisdiction of this Board to hear such appeals in the numerous matters in the past but elects to raise this question of jurisdiction to hear now.

The displeasure of the learned chairman and the Board is understandable but in law SOCSO is not estopped from raising the issue of jurisdiction even if SOCSO had submitted to jurisdiction generally numerous times before. Let it be said loud and clear and early in this judgement that *an invalidity or disablement question* is exclusively for the medical board and the appellate medical board to decide. With due respect to the chairman of the Board, the plight of and the sympathy for the respondent is not misplaced. The report of the board is incomplete and unsatisfactory. In that report (p 30 of the appeal record) only item two and eight are filled up namely '(2) the finding of the medical board sitting on 25 January 1994 is confirmed' and '(8) Thyrotoxicosis controllable with medication. No evident heart failure presently. Not invalid.' It appears that the board considered all the other particulars irrelevant and immaterial. Item 5: whether the insured person is suffering from invalidity is not ticked. Item 9: whether the insured person requires treatment is not ticked either. There was no serious deliberation or effective examination of the respondent's heart condition.

I have scrutinized the appeal record carefully and heard submissions anxiously. In my view, the Board has no such jurisdiction and I therefore allowed the appeal and set aside the decision of the Board. I had given four reasons to support my view at the hearing of the appeal. At the request of the learned counsel for SOCSO and others interested in this decision, I have written this grounds of judgement although there is no appeal against the decision.

Invalidity question, a medical answer

The respondent is entitled to invalidity pension if the medical board certify that he is suffering from invalidity. The board shall so certify if by reason of

A a specific morbid condition of permanent nature, he is incapable of engaging in any substantially gainful activity. The terms 'morbid condition of permanent nature' and 'incapable of engaging in any substantially gainful activity' is explained in the Act. Section 15 of the Act states:

> 15 Subject to the provisions of this Act, the insured persons, their dependants or the persons hereinafter mentioned, as the case may be, shall be entitled to the following benefits, namely:
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> (a) periodical payments to an insured person in case of invalidity certified by a duly appointed medical board or by an authority specified in this behalf by the regulations ('invalidity pension');
>
> (b) periodical payments to an insured person suffering from disablement as a result of an employment injury sustained as an employee under this Act and certified to be eligible to such payments by an authority specified in this behalf by the regulations ('disablement benefit');
>
> 16 (1) An insured person shall be considered as suffering from invalidity, if, by reason of a specific morbid condition of permanent nature, he is incapable of engaging in any substantially gainful activity.
>
> (2) For the purposes of sub-s (1) —
>
> (a) a morbid condition shall be deemed to be of permanent nature if it is either incurable or is not likely to be cured;
>
> (b) a person shall be deemed to be incapable of engaging in substantially gainful activity, if in consequence of the specific morbid condition of sickness or infirmity, he is no longer capable of earning, by work corresponding to his strength and physical ability which, in view of his training and former occupation, might reasonably be assigned to him at the place of his employment or at a similar place in the neighborhood or in the same district, one-third of the customary earnings of a mentally and physically sound person with similar qualifications and training;
>
> (c) in determining whether the claimant is suffering from invalidity, account shall be taken of any permanent improvement in the state of his invalidity which results or is expected to result from such measures of physical or vocational rehabilitation as may be offered to him free of charge by the Organization.

The specialist certified that the respondent is a case of thyrotoxicosis with heart failure and that he is unable to continue his employment as a machine operator. It is then for the medical board to certify, after considering the specialist report and after examining the respondent, whether he is suffering from a specific morbid condition of permanent nature and incapable of engaging in any substantially gainful activity. The board found that he was suffering from CCF (congestive cardiac failure) and thyrotoxicosis which could be controlled by medication and certified that the respondent was not suffering from a morbid condition nor require the permanent attendance of another person and that he was not suffering from invalidity.

On appeal to the appellate medical board, the appellate board considered the specialist report, the medical finding of the medical board and the appellate board's own finding that the respondent was suffering

from thyrotoxicosis which could be controlled by medication and that there was no evident heart failure presently and concluded that he was not suffering from invalidity. It is noted that the medical board comprised a chairman and one member and the appellate medical board comprised a chairman and two assessors, involving six medical specialists to decide on the medical condition of the respondent. These constitute sufficient safeguard. In my view the invalidity question is a medical question, better if not best answered by the medical profession and jurisprudence. The Board, comprising a legally qualified chairman and two assessors, as representative of the employers and employees is not competent to decide on such medical question.

The right of appeal

The Act confers on an aggrieved party — the insured person or SOCSO — a right to appeal against the decision of the medical board to the appellate medical board. Section 33(2) of the Act states:

> If the insured person or the Organization is not satisfied with the decision of the medical board, the insured person or the Organization may appeal, in the prescribed manner and within the prescribed time, to the appellate medical board constituted in accordance with the provisions of the regulations.

The Act does not provide further appeal to the Board relating to invalidity pension or permanent disablement benefit. Nor is the Board empowered to decide on an invalidity or disablement question. If such questions arise in any proceeding before the Board, the Board shall direct SOCSO to have the questions decided by the medical board or appellate medical board. The Board shall not decide on such questions. Section 84(3) of the Act states:

> If in any proceedings before the Board an invalidity or disablement question arises and the decision of a medical board or appellate medical board has not been obtained on the same and the decision of such question is necessary for the determination of the claim or question before the Board, the Board shall direct the Organization to have the question decided by this Act and shall thereafter proceed with the determination of the claim or question before it in accordance with the decision of the medical board or the appellate medical board, as the case may be.

It must be noted that the civil court has no jurisdiction to decide or deal with any question or dispute which is to be decided by the Board or the medical board or the appellate medical board except by way of reference on a question of law or by way of appeal on a substantial question of law respectively (ss 84(4), (5), 90, 91 of the Act).

These provisions lock out the Board from sneaking into the realm of medical jurisdiction and jurisprudence of the medical board and the appellate medical board. Even the court as the custodian of justice and keeper of the master key is allowed limited access. My humble view that the Board has no appellate jurisdiction over the appellate medical board is

fortified further from the clear intention of the legislature in s 91(1) of the Act. The section states:

> Save as expressly provided in this section, no appeal shall lie from an order of the appellate boards set up by or under this Act.

The word 'boards' in the plural number denotes both 'the appellate medical board and the Board. In other words, it means and includes that an appeal shall not lie from an order of the appellate medical board to the Board.

Review

The Act empowers both the medical board and the appellate medical board to review its own decision (s 34 of the Act). The power to review, in other legislation is conferred to a person or body of superior jurisdiction. In my view, the legislature by conferring on the medical board and the appellate medical board the self serving power to review its own decision intends that the decision of both boards are final, conclusive and not appealable, certainly not to the Board and with exception to the High Court.

Other legislation

I have perused and compared similar legislation in India. Whereas in India, s 75(2A) of the Employee's State Insurance Act 1948 ('the Indian Act'), which is in pari materia with our s 84(3) has been amended to empower the Employee's Insurance Court to determine all the issues where an appeal has been filed before it. The section states:

> If in any proceedings before the EIC, a disablement question arise and the decision of a medical board or medical appeal tribunal has not been obtained, … the EIC shall direct the Corporation to have the question decided … and thereafter proceed with the determination of the claim … in accordance with the decision of the medical board or the appellate medical board, as the case may be, *except where an appeal has been filed before the EIC under sub-s (2) of s 54A in which the EIC may itself determine all the issues arising before it*. (Emphasis added.)

Section 54A of the Indian Act provides that an insured person who is not satisfied with the decision of the medical board may appeal to the medical appeal tribunal with a further right of appeal to the Employees' Insurance Court.

The present position in our country relating to this substantial question of law is that there is no appeal from the decision of the appellate medical board to the Board. No amendments have been made to the relevant sections or s 84(3) of the Act unlike ss 54A and 75(2A) of the Indian Act.

The answer to the first substantial question of law is: The Board erred in law in deciding that the respondent was suffering from invalidity and the answer to the second question is: the medical board and the appellate medical board decide whether the respondent is suffering from invalidity; the Board is not to so decide.

I therefore allowed the appeal of the Director General of SOCSO and set aside the decision of the Board.

Appeal allowed and decision of the social security appellate board set aside.

Reported by Moy Saw Han